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No. 88-1034

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

QUENTIN M. DERRYBERRY, II, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a question asked of petitioner under oath was "fundamentally ambiguous" as a matter of law and thus could not be used as a basis for petitioner's perjury conviction.

2. Whether a bankruptcy judge's factual finding, which was based in part on petitioner's false testimony and which was made in a civil proceeding in which the United States did not participate, collaterally estops the government from prosecuting petitioner for perjury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is unreported. An earlier opinion of the Bankruptcy Court for the Northern District of Ohio (Pet. App. C1-C51) is reported at 50 Bankr. 852.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1988. A petition for rehearing was denied on October 13, 1988. The petition for a writ of certiorari was filed on December 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of perjury, in violation of 18 U.S.C. 1623, and embezzlement from a bankruptcy estate, in violation of 18 U.S.C. 153. He was sentenced to three years' probation and was ordered to pay $8500 in restitution. The court of appeals affirmed petitioner's perjury conviction but vacated his conviction for embezzlement (Pet. App. A15-A17).[1]

1. The facts underlying petitioner's conviction are set out in the opinion of the court of appeals (Pet. App. A1-A9) and in the government's brief below (Gov't C.A. Br. 1-13). Briefly, they show that petitioner, an attorney who was appointed as a trustee in bankruptcy, committed perjury at a bankruptcy court hearing on a motion filed by a creditor to remove petitioner from his trusteeship position.

In September 1981 petitioner was appointed trustee in the voluntary bankruptcy of James Hartley. In his role as trustee, petitioner worked closely with Merle Weber, who represented some creditors of the bankrupt estate. Weber and petitioner determined that Hartley had other assets that he had not declared and that might be available for distribution to Hartley's creditors. Accordingly, in November 1981 petitioner and Weber met with an attorney, George Ferstle, to discuss forming a creditors' fund through contributions by Hartley's creditors, including the Mid-West Insurance Agency and the Peoples Banking Company of McComb. Petitioner proposed that

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[1] The jury acquitted petitioner of the charge of conspiracy to embezzle money from a bankruptcy estate and was unable to reach a verdict on a second perjury count. After the jury announced its inability to reach a verdict on the second perjury count, the district court entered a judgment of acquittal on that count.

the fund would pay for an attorney for the trustee and would defray the investigative costs incurred in uncovering the hidden assets.

On December 16, 1981, petitioner held a creditors meeting to discuss the establishment of the fund. Petitioner explained to the assembled creditors that the estate lacked liquid assets for the investigation and anticipated litigation, which petitioner speculated would cost approximately $75,000. Petitioner also proposed that Weber would serve as the investigator and would work with him and attorney Ferstle. Following the meeting, several creditors made out checks payable to petitioner. The owner of Mid-West gave Weber a check for $5000 payable to petitioner. The Mid-West check was deposited into petitioner's personal checking account, and petitioner spent the proceeds for his personal use. The chief executive of the Peoples Bank gave Weber a check for $3500 to give to petitioner. The check bore the notation "For PBC-Creditors' Group." Petitioner deposited that check as well into his personal account and spent the money for his own personal use.

Other creditors also gave checks to Weber for the fund. For example, one gave Weber a check for $2000, which was made payable to petitioner and which bore the notation "Expense fund—Hartley recovery." Weber deposited those checks into his personal checking account at the Peoples Bank, after endorsing petitioner's name on them. The bank's chief executive officer asked Weber about the endorsements; Weber stated that petitioner had agreed to the procedure, and petitioner repeatedly assured the bank officer that he had authorized Weber to sign his name. Pet. App. A3-A4.

In April 1982, Ferstle prepared an Application for Instructions and Advice that sought guidance from the bankruptcy court concerning the handling of the creditors' fund money. The bankruptcy court held a hearing on the

application the following month, which petitioner attended. At the hearing Ferstle told the bankruptcy judge that the organizers of the creditors' fund had already collected $12,000 to $13,000 from the creditors and that Weber was holding the funds in escrow and was awaiting instructions. The court approved the fund but made clear that Weber was not to participate in the fund in any way. On June 4, 1982, the court entered an order, attached to which was an exhibit setting forth the contributions made by various creditors, including Mid-West and the Peoples Bank. The total amount of the creditors' contributions reflected on the exhibit was $13,880. The two largest contributions were the $5000 from Mid-West and the $3500 from the Peoples Bank. In addition, there were 11 other contributions ranging in amount from $40 to $2000. Pet. App. C8.

2. In November 1983, the Bank moved to have petitioner removed as trustee of the Hartley estate. In April 1985 the bankruptcy court held a hearing on the Bank's motion. Petitioner testified at the hearing. During his testimony, he was shown a copy of the schedule of contributors and amounts contributed that had been attached as an exhibit to the June 1982 order. He testified about the schedule as follows (Gov't C.A. Br. 12, citing Tr. 645-646):

> Q. Does that order contain a list of creditors and amount of money beside their names as an exhibit?
> A. It does.
> Q. Does that amount of money total $13,880.00?
> A. It's not totalled.
> Q. Have you ever taken the time to total it?
> A. I'm familiar with the figure that is $13,880.00.
> Q. Have you ever had possession of any of that $13,880.00?
> A. No Sir.

Based in part on that testimony, in June 1985 the bankruptcy judge entered an order (Pet. App. C1-C51) in which he found that "[t]he $13,880 was never turned over to [petitioner] by Mr. Weber nor was any action taken by creditors demanding the return or delivery of their contributions" (*id.* at C8). The judge further found that "[t]he uncontroverted testimony at trial was that the creditors gave the money to Mr. Weber. * * * There being no evidence that the money was ever presented to the Trustee the court must find that the allegation that he allowed it to fall into the hands of Mr. Weber is completely without merit." *Id.* at C27-C28. For those reasons, among others, the bankruptcy court denied the bank's motion to remove petitioner as trustee. *Id.* at C51.

3. Petitioner was subsequently indicted on several charges relating to the handling of the money in the creditors' fund and petitioner's testimony before the bankruptcy judge on that subject. The perjury count on which petitioner was ultimately convicted was based on his testimony that he had never been in possession of any of the $13,880 in the creditors' fund. The court of appeals affirmed petitioner's conviction on that count, rejecting his argument that the question about his possession of the $13,880 was ambiguous and his argument that his testimony on that point was not material to the proceeding before the bankruptcy judge. Pet. App. A12-A15.

ARGUMENT

1. Petitioner challenges his perjury conviction on two grounds. First, he contends (Pet. 26-32) that the question whether he ever had possession of any of the $13,880 collected from the creditors was ambiguous as a matter of law. The issue whether the question was ambiguous is a fact-specific issue that was resolved against petitioner by

both courts below. Accordingly, further review of that question is not warranted. In any event, petitioner's suggestion of ambiguity is without substance.

As the court of appeals found, "[petitioner's] testimony here was literally false." Pet. App. A13. The question whether petitioner had "ever had possession of any of that $13,880" was clear on its face, and nothing about the context made it ambiguous. Consequently, petitioner's denial in response to that question was indisputably false.

Petitioner contends that the question was ambiguous because, when petitioner was asked at another point during the hearing whether he had received the Bank's $3500 contribution, petitioner admitted that he had. Thus, he urges, when he was asked about the $13,880 he must have understood the question to refer to those checks which were given to Weber and which Weber had deposited into his own account.

Petitioner is wrong in asserting that the question "Have you ever had possession of any of that $13,880?" was ambiguous. The question was perfectly clear, and petitioner's response was plainly false. Indeed, petitioner does not now deny that he had possession of some of the money that comprised the $13,880 listed in the exhibit attached to the June 1982 order; in fact, the evidence is clear that petitioner received and deposited into his own account the two largest contributions to the fund—the $5000 check from Mid-West and the $3500 check from the Peoples Bank. Those two checks alone made up more than half the $13,880 about which petitioner testified.

This Court's decision in *Bronston* v. *United States,* 409 U.S. 352 (1973), which involved an answer that was misleading but literally true, does not aid petitioner, since petitioner's answer was literally false. The issue in this case is therefore not the truth or falsity of petitioner's

testimony, but whether petitioner understood the question to refer to only a portion of the $13,880, as he claims. The issue of petitioner's understanding of the question, which goes to whether petitioner's false testimony was given knowingly, was a question for the jury. See *United States* v. *Anderson,* 798 F.2d 919, 930-931 (7th Cir. 1986); *United States* v. *Bell,* 623 F.2d 1132, 1136 (5th Cir. 1980); *United States* v. *Cuesta,* 597 F.2d 903, 920 (5th Cir.), cert. denied, 444 U.S. 964 (1979). The jury heard petitioner's explanation for testifying as he did about the $13,880, and it obviously did not credit that explanation, because by finding him guilty of perjury, the jury found that petitioner had knowingly testified falsely about the $13,880.

It is not surprising that the jury rejected petitioner's explanation for his false testimony. Contrary to his assertion, he did not "admit" receiving the $3500 Peoples Bank contribution to the creditors' fund. Rather, he "admitted" only that he had received a check from the bank. He denied that the check bore the notation "For PBC-Creditor's Group," although the evidence at trial showed that the explanation had been written on the check at the time petitioner received it. Gov't C.A. Br. 13 n.5, citing Tr. 520-532, 658. Thus, petitioner's "admission" with respect to the $3500 check does not indicate that his testimony about the creditors' fund was meant to apply only to the funds received by Weber. Moreover, petitioner did not admit at the hearing that he had also received the $5000 contribution from Mid-West. Petitioner's testimony at the bankruptcy hearing therefore does not support his contention that he necessarily misunderstood the question that was the subject of the perjury charge on which he was convicted.

2. Petitioner next contends (Pet. 32-33) that the bankruptcy judge's finding (Pet. App. C8) that "[t]he $13,880 was never turned over to the Trustee by Mr.

Weber" barred the perjury prosecution under principles of *res judicata* or collateral estoppel. Petitioner did not make this argument to the district court, nor did he argue it to the court of appeals until his petition for rehearing.[2] As a consequence, he has waived the claim. See *United States* v. *Lovasco,* 431 U.S. 783, 788-789 n.7 (1977); *Lawn* v. *United States,* 355 U.S. 339, 362-363 n.16 (1958).

Apart from the waiver, petitioner's argument is legally without support. Contrary to the conclusion of the court of appeals in connection with the embezzlement count (Pet. App. A16), the United States was not a party to the bankruptcy court proceeding. Neither the United States Attorney nor the Department of Justice joined in the Bank's motion to remove petitioner as trustee of the Hartley bankruptcy estate, and the United States did not participate in the hearing that led to the bankruptcy judge's finding on which petitioner relies.

As this Court has held, "the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Allen* v. *McCurry,* 449 U.S. 90, 95 (1980) (citation omitted)). Since the United States was not a party to the trustee removal proceeding, it had neither an opportunity to challenge the truthfulness of petitioner's testimony before the bankruptcy judge, nor an interest in doing so. Collateral estoppel is therefore inapplicable here.

In addition, the bankruptcy judge's finding, on which petitioner relies, was based at least in part on petitioner's testimony, which the jury in this case has found beyond a

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[2] In the court of appeals petitioner argued that the false statement was not material, challenging the sufficiency of the government's proof that the statement influenced the bankruptcy judge. The court of appeals rejected that claim. See Pet. App. A14-A15.

reasonable doubt to be false. Because the bankruptcy judge's finding was premised on false testimony, that finding is tainted by fraud and should not serve as the basis for preclusion of later proof of perjury in the bankruptcy proceeding. Cf. Restatement (Second) of Judgments §§ 28, 70 (1982) (relief from claim and issue preclusion where initial judgment was obtained by fraudulent means). If the rule were otherwise, a party could often avoid prosecution for perjury simply by lying in one proceeding, obtaining a favorable finding in that proceeding based on the perjured testimony, and then claiming that the government was estopped by that finding from proving that the testimony on which the first factfinder relied was false. To apply collateral estoppel in that context " 'would be to put a premium on perjury and to make immunity from punishment for perjury rest on success in commission of the crime.' " *United States* v. *Fayer,* 573 F.2d 741, 745 (2d Cir.) (citation omitted), cert. denied, 439 U.S. 831 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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